

**STATE OF CALIFORNIA  
ENVIRONMENTAL PROTECTION AGENCY  
DEPARTMENT OF TOXIC SUBSTANCE CONTROL**

In the Matter of:	)	Case No.: PAT-FY08/09-03
	)	
CHEMICAL WASTE MANAGEMENT, INC., BAKERSFIELD FACILITY	)	CHEMICAL WASTE MANAGEMENT, INC. REPLY BRIEF IN SUPPORT OF APPEAL OF FINAL POST CLOSURE PERMIT
	)	
EPA ID. No. CAT000624056	)	
	)	CASE NO: 05-CA-624
	)	Division A
	)	

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**INTRODUCTION**

Chemical Waste Management, Inc. (“CWM”) has worked cooperatively over the past three years with DTSC program staff to investigate conditions at the former Bakersfield facility, a Site that was closed in 1988.<sup>1</sup> DTSC technical staff concluded, in their memorandum of April 26, 2009, that the closure cover is in good condition and meets applicable regulatory requirements. That important conclusion, coupled with CWM’s extensive studies, are a sound basis for transferring this Facility to the oversight of the California Regional Water Quality Control Board, Central Valley Region (“Water Board”), as proposed by senior DTSC program staff in December 2008 and January 2009.<sup>2</sup>

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<sup>1</sup> Defined terms in this Reply Brief have the same meaning as in the CWM Opening Brief.

<sup>2</sup> See detailed discussion in CWM Opening Brief at pp. 22-24, 31-38.

Extensive technical studies conducted by CWM concluded that:

- 99.76% of waste that went to the Facility was clearly *non-hazardous*.
  - The remainder may not have been hazardous either.
- The waste that remains at the Site today is *not hazardous*, based on 238 waste samples and approved DTSC methodology.
- Leachate and groundwater at the Site are *not hazardous*.
- As to the non-hazardous waste remaining at the Site, the *cover is in good condition and functioning properly*.

CWM has done everything that DTSC program staff has requested. DTSC staff has thoroughly evaluated the reports submitted by CWM. The April 26, 2009 memorandum contains a detailed analysis of Site conditions and the closure cover. This memorandum has important conclusions that differ substantially from the findings that were the basis for the Appealed Post-Closure Permit issued by DTSC in 2007. The memorandum shows that the factual findings and assumptions on which the 2007 Appealed Post-Closure Permit was issued (which required a \$30 million new landfill cover and an extended *post-closure care period lasting until 2037*) are now moot and superseded.

The fair and logical result is for DTSC to close out the RCRA post-closure permit and to finalize the transition of this Site to oversight of the Water Board, an action initiated by senior DTSC program staff working with CWM technical staff.<sup>3</sup>

For DTSC counsel to suggest that three years of hard work by CWM – and by DTSC program staff – were misspent and that this course of action should never have been undertaken is not ‘good government’. CWM spent over \$1 million following the directives of DTSC

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<sup>3</sup> See CWM Opening Brief at p. 9.

program staff and using one of the options outlined in the Appealed Post-Closure Permit in order to bring this matter to a conclusion.<sup>4</sup>

CWM performed a series of studies, all of which show that the Site does not need to stay in RCRA post-closure care. In fact, its studies have fully substantiated CWM's request for 'clean closure' of the Site (and termination of the RCRA post-closure permit), as made in CWM's November 4, 2008 letter to DTSC.<sup>5</sup> CWM filed the appeal because it disagreed with the determination in the 2007 Appealed Post-Closure Permit requiring a \$30 million new cover for the landfill and an additional 30 years of post-closure care. DTSC has now agreed that a new cover is not needed. And by late 2008, DTSC senior staff had agreed that Site conditions warranted completion of RCRA post-closure care and transition of Site to the Water Board, with the request that one final risk assessment study be submitted to DTSC. That risk assessment is scheduled to be submitted to DTSC in June 2009.

In the 2007 Appealed Post-Closure Permit, DTSC sought to roll the post-closure care period forward for another 30 years i.e., from 2007 until 2037. In its Opposition Brief, DTSC claims that the existing regulations allow it to do so without any factual findings to support an extended period. Effectively conceding that the existing regulations do *not* support its legal arguments, however, DTSC has issued a proposed rulemaking seeking to *change* those very regulations to conform them to its advocacy in this case.<sup>6</sup> And DTSC has expressly conceded

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<sup>4</sup> As of April 2009, the amount expended by CWM on technical assessments for the Facility is approximately \$1,115,000 (not including internal CWM staff time or costs associated with this appeal).

<sup>5</sup> Letter from Phil Perley (CWM) to Wade Cornwall (DTSC), November 4, 2008, attached as Exhibit 1.

<sup>6</sup> DTSC Proposed Financial Assurance Regulations, DTSC Ref. No. R-2007-06; OAK Ref. No. Z-2009-0326-01.

that the stated technical basis for seeking an extension of the fixed 30-year post-closure period (i.e. that the landfill cover was not adequately protective ) is now moot. DTSC's Opposition Brief waives that argument along with the 2007 permit condition requiring CWM to reconstruct the cover.

With neither a technical nor legal basis to impose a rolling 30-year post-closure care period on a facility that has no hazardous waste, DTSC's Opposition Brief appears to simply presume that it can name a new 30-year care period for the Site, without making any specific findings of fact, and relying only on regulations that are not yet adopted. That position is legally and equitably insupportable. The retroactive application of draft regulations that are not yet even adopted violates core concepts of due process. For the reasons set forth below and in CWM's Opening Brief on Appeal, CWM respectfully requests that this tribunal grant the relief requested herein.

## DISCUSSION

### 1. DTSC's Opposition Brief Misconstrues the Applicable Regulations

#### 1.1 **The 30-Year Post-Closure Period is a *Fixed* Period that Begins After Facility Closure and DTSC Must Make *Findings* to Extend the 30 Years**

Under DTSC's regulations, post-closure care is a fixed period that begins at the completion of closure and lasts for 30 years.<sup>7</sup> In this case, the 30-year post-closure care period began on **April 1, 1988** and is scheduled to expire **April 1, 2018**. Although California law clearly limits the duration of a post-closure care *permit* to *10-year increments*,<sup>8</sup> that does not in any manner imply that a new *30-year post-closure care period* is started anew each time the permit is re-issued, or 'renewed'.

To the contrary, in order for DTSC to extend the post-closure care period, it must make *findings*:

**Any time ...during the [30-year] post-closure period . . . the Department shall, in accordance with the permit modification procedures in chapters 20 and 21 of this division . . . extend the post-closure care period . . . if the Department *finds* that the extended period is necessary to protect human health and the environment (e.g., leachate or groundwater monitoring results indicate a potential for migration of hazardous wastes at levels which may be harmful to human health and the environment).**<sup>9</sup>

DTSC ignores these important regulations in its Opposition Brief. Instead, it argues that there are no constraints whatsoever on DTSC when it renews or re-issues a post-closure permit at the end of a 10-year permit period. According to DTSC, it can apparently do whatever it wants

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<sup>7</sup> 22 Cal. Code Reg. § 66264.117(b)(1).

<sup>8</sup> Cal. Health & Safety Code § 25200(c)(1)(A).

<sup>9</sup> 22 Cal. Code Reg. § 66264.117(b)(2).

after 10 years. The regulations however, are explicit about the findings that must be made to extend the post-closure care period beyond 30 years.

DTSC's Opposition Brief states that the agency "will typically issue a renewed 30 year post-closure period . . ." when a RCRA post-closure care permit is renewed. However, it gives no examples of where the agency has done so at other sites in the State of California. This interpretation of the regulations would extend the Bakersfield post-closure period until **2037** – well beyond 2018, which is the end of the defined 30-year period.

Attached as Exhibit 2 is a chronology that shows the sequences of key regulatory events at the Bakersfield Site over the past decades. It illustrates the difference between the defined 30 year post-closure period and DTSC's proposed extension of the period until 2037.

DTSC also argues that when a permit is reissued, "the entire permit is reopened and subject to revision and the permit is reissued for a new term."<sup>10</sup> However, the provision that DTSC cites applies when a permit is *revoked for cause* and reissued; it does not apply to permits that are reissued after they *expire naturally*.<sup>11</sup> Further, the statute establishing a 10 year limit on

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<sup>10</sup> The fact of the matter is that although the California legislature decreed that post-closure care *permits* can last only for 10 years, the Title 22 regulations do not establish any specific procedures that must be followed for permit re-issuance and renewal (after 10 years). They address initial permit issuance (§ 66270.30), permit revocation, re-issuance and modification by DTSC (§ 66270.41), and permit modification at the request of the permittee (§ 66270.42), but they do not specifically prescribe a process for permit renewals at the end of the natural life of a post-closure permit (i.e., after 10 years).

<sup>11</sup> The difference is important. Whereas one could imagine that if DTSC found cause to *revoke* a permit, it would be appropriate for the agency to reevaluate every permit condition in the revoked permit before reissuing a new one. In the case of a permit that is *renewed* simply because the end of the 10 year term is reached, there would be no impetus to require DTSC to consider anew every permit condition

RCRA permits compels DTSC to make a finding of *necessity* when it establishes permit conditions, even at the renewal period. The law states:

Each permit issued under this section shall contain **such terms and conditions as** the Administrator (or the State) determines **necessary to protect human health and the environment.**<sup>12</sup>

In this case, the April 26, 2009 DTSC memorandum shows that the landfill cover at the Bakersfield Site meets all applicable requirements and that there is no necessity for an extended 30-year period.

Importantly, the Title 22 regulations are very clear on two key points that are critical to this appeal:

1. The 30-year post-closure period is a *fixed* term that begins upon facility closure.<sup>13</sup>
2. DTSC must make *findings of necessity* to protect human health or the environment to *extend* the 30-year period.<sup>14</sup>

As to the definition of the 30-year post-closure period, the Title 22 regulations state:

**Post-closure care** for each hazardous waste management unit . . . **shall begin after completion of closure of the unit and,** except as provided in subsections (b)(2)(A) and (b)(2)(B), **continue for 30 years after that date . . .**<sup>15</sup>

Note that the post-closure care period is *not* tied to the 10-year permit renewal periods, but to the completion of closure of a unit.

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<sup>12</sup> Cal. Health & Safety Code § 25200(d)(2).

<sup>13</sup> 22 Cal. Code Reg. § 66264.117(b)(emphasis added); *see also* 40 C.F.R. § 264.117(a)(1).

<sup>14</sup> *Id.*

<sup>15</sup> 22 Cal. Code Reg. § 66264.117(b)(1) (emphasis added).

The regulations are equally clear that to *extend* the 30-year period DTSC must make *factual findings of necessity*:

Any time . . . during the [30-year] post-closure period . . . the Department shall...**extend the post-closure care period** . . . if the Department **finds that the extended period is necessary to protect human health and the environment** (e.g., leachate or groundwater monitoring results indicate a potential for migration of hazardous wastes at levels which may be harmful to human health and the environment).<sup>16</sup>

DTSC cannot reconcile the plain language above – the only section in Title 22 that addresses the 30-year post-closure period – with its argument that the agency can automatically extend the 30-year post-closure period every 10 years upon permit renewal, *with no factual findings*. It is wholly illogical to argue that DTSC must make factual findings about the necessity to protect health and the environment to extend the 30-year period *during* a 10-year permit, but that it can ignore those findings at the 10 year permit *renewal* marker.

With respect to the Bakersfield Site, DTSC cannot make findings of any necessity to add 30 more years to protect human health and the environment. The weight of evidence, largely accepted by DTSC (described in detail in CWM’s Opening Brief and in DTSC’s April 26, 2009 memorandum), is that the Site is a stable, low-risk, non-hazardous waste disposal site with a cover that meets all applicable requirements. The findings on which the 2007 Appealed Post-Closure Permit was based have been superseded by the April 26, 2009 DTSC staff memorandum.

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<sup>16</sup> 22 Cal. Code Reg. § 66264.117(b)(2) (emphasis added).

## 1.2 A Rolling 30-Year Period is Contrary to Law

DTSC also fails to reconcile its argument for a rolling 30-year period every 10 years at permit renewal with the governing law in the federal RCRA regulations, the foundation for California's Title 22.

As CWM explained in its Opening Brief, EPA had an extended public comment process when it initially adopted the RCRA post-closure regulations. It took comments from many stakeholders – state governments, environmentalists, disposal site operators, and others. After careful consideration of competing views, EPA expressly rejected an approach that would have required post-closure care in perpetuity and instead placed the obligation on the government to justify care beyond a 30-year period.<sup>17</sup>

Thus, for DTSC to change the current standard from a *fixed* 30-year period to a *rolling* 30-year period, (or an indefinite period to be determined by DTSC upon each permit renewal every 10 years), would run counter to the express intent of the federal and state regulations and would represent a dramatic departure from established policy.<sup>18</sup> This shift in policy would have a significant impact on the settled expectations of companies that manage closed waste disposal sites. It would eliminate the certainty provided by existing laws, that require DTSC to justify with specific findings an extension of the fixed 30-year period. Such a shift in policy is not only without basis in law, but would have a particularly severe impact on California businesses in this troubled economy.

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<sup>17</sup> CWM Opening Brief at pp. 14-16.

<sup>18</sup> DTSC sent CWM a letter on April 14, 2004 suggesting that California has a 100 year post-closure care period and that every 10 years when the permit is renewed, the 30-year horizon rolls forward until the century mark is reached. We note that DTSC makes no attempt to justify this extraordinary assertion in its Opposition Brief.

Applied to the Bakersfield Site, this new policy would be particularly illogical – all the studies show that the Site received non-hazardous waste, that it does not now contain hazardous waste, that the leachate and groundwater do not contain hazardous constituents, that the cover is intact, in good condition and meets all applicable requirements, and that it is a low risk facility that can be transferred to the jurisdiction of the Water Board.

When DTSC issued the draft Post-Closure Permit in 2006, the Site was approximately 18 years into a 30-year post-closure care period. It was premature then to propose an extension. EPA has explained that extensions of post-closure care are properly made in the “last few years of the post-closure period.”<sup>19</sup> This is because any determination made prematurely might be superseded by changed conditions toward the end of the 30-year period. It would be wasteful of resources – both private and public – to engage in speculative debates early on or midway into the post-closure period, only to undertake that same analysis all over again as the period comes to a close. DTSC always has authority to extend (or shorten) the 30-year post-closure period if it can justify the necessity for such a decision with findings based on impacts to human health or the environment. However, such circumstances are not present in this case.

### **1.3 DTSC’s Proposed Post-Closure Care Regulations Do Not Apply to This Case**

DTSC has issued new draft regulations that, if adopted, will explicitly allow it to impose new open-ended post-closure periods when permits are renewed.<sup>20</sup> The draft regulations were not in effect in November 1985, when the Site stopped receiving waste. They were not in effect in November 1987, when closure construction was completed for the Facility. They were not in

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<sup>19</sup> CWM Opening Brief at pp. 26-27; 49 Fed. Reg. 50,362.

<sup>20</sup> DTSC Proposed Financial Assurance Regulations, DTSC Ref. No. R-2007-06; OAK Ref. No. Z-2009-0326-01.

effect on April 1, 1988, when the Bakersfield post-closure care period began. They were not in effect on April 30, 1991, when the initial post-closure permit was issued for the Site. Nor were they in effect in 2007, when the Appealed Post-Closure Permit for the Site was issued. And they are not in effect now, in 2009. Therefore, the proposed regulations are legally inapplicable to this case, and the Hearing Officer must disregard them, as a matter of law.

CWM pointed out in its Opening Brief that the Administrative Procedures Act prevents DTSC from enforcing a 100-year (or rolling 30-year post closure period) without notice and comment rulemaking.<sup>21</sup> To do so would be an impermissible ‘underground regulation’. The irony is that while DTSC argues that it was authorized to roll the Bakersfield post-closure period forward another 30 years in 2007, the agency now seeks to amend the regulations to accomplish the very thing that it says the regulations have always allowed. Even a cursory review of DTSC’s proposed changes to the existing text of 22 Cal. Code Reg. § 66264.117(b) confirms this:

...the requirements of sections 66264.117 through 66264.120 shall begin after completion of closure of the unit and, ~~except as provided in subsections (b)(2)(A) and (b)(2)(B), continue for 30 years~~ after that date, except as provided in subsection (g) and (h).<sup>22</sup>

Likewise, DTSC is seeking changes to the financial assurance provisions of Title 22 that would allow it to do that which it insists it is already authorized to do:

The postclosure cost estimate is calculated by multiplying the annual postclosure cost estimate by ~~the number of 30 years or as of postclosure care~~ required under section 66264.117. This period may be reset to thirty years each time the postclosure permit is

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<sup>21</sup> CWM Opening Brief at p. 29.

<sup>22</sup> Proposed Regulations for Financial Assurance, DTSC Ref. No. R-2007-06, Oak Ref. No. Z-2009-0326-01 at p. 3.

issued or renewed. This period will be determined consistent with determinations made in section 66264.117.<sup>23</sup>

The DTSC's Opposition Brief seems to presume that the draft regulations apply to CWM Bakersfield. This presumption raises very serious due process concerns and thus is not one in which a reviewing court would likely acquiesce.<sup>24</sup>

Contrary to DTSC's assertion in its Opposition Brief, the pending regulation is not a "clarification" of existing state law. The changes that DTSC is proposing would significantly change the substantive rights of permit holders whose facilities would become subject to an indefinite post-closure care period, with no protections to ensure that a regulatory agency's decision to expand the 30-year period is based on sound facts.

In sum, DTSC's proposed rulemaking is an admission that the existing regulations do not support its positions on appeal; CWM believes strongly that a reviewing court would agree. And retroactive application of those proposed regulations, should they become law, would violate principles of due process and fair play.<sup>25</sup>

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<sup>23</sup> *Id.* at p. 10.

<sup>24</sup> It is a well-settled principle of administrative law that retroactivity is not favored and that administrative rules should not be construed to have retroactive effect unless their language requires that result. *See Aktar v. Anderson*, 68 Cal.Rptr.2d 595 (Cal. Ct. App. 1997). Moreover, courts have declined to accord any authority to litigation-inspired administrative regulations, particularly when the administrative agency is a party to the litigation. *See Bowen v. Georgetown Univ. Hosp.* 488 U.S. 204 (1988); *People ex. rel Lundgren v. Cotter*, 62 Cal.Rptr.2d 368 (Cal Ct. App. 1988).

#### **1.4 DTSC Has the Burden of Making Findings When it Wishes to Extend or Shorten the 30 year Post-Closure Care Period**

DTSC's Opposition Brief argues that Title 22 requires the agency to make findings to extend the 30-year post-closure care period *only* in the context of a permit *modification*.<sup>26</sup> And because DTSC is seeking to extend the Bakersfield post-closure care period as part of a permit *renewal*, it argues that it has unfettered discretion.

Again, Title 22 does not support DTSC's position: There is no dichotomy in the regulations between DTSC's evidentiary burden during a permit modification and its burden during a permit renewal.

It would not make sense to read the regulations to apply constraints on DTSC's authority in the context of a modification, but not in the context of a permit renewal. In applying canons of statutory construction to Title 22, a reviewing court is unlikely to adopt an illogical and inconsistent reading of the renewal and modification provisions.

#### **2. DTSC Has Acknowledged that a New Cover is Not Needed**

CWM is pleased that DTSC program staff have acknowledged and accepted the data collected over the past twenty-four years demonstrating that the Site cover is performing effectively and meets all requirements. CWM concurs that the Special Condition 3.b. of the Appealed Post-Closure Permit should not be part of any re-issued permit.

#### **3. DTSC's Arguments and Conduct in Connection with the Renewal Permit Are Inconsistent with 'Good Government' Practices**

Respectfully, CWM maintains that DTSC's legal arguments on the applicable regulations are plainly wrong and should not be accepted by this tribunal. Furthermore, DTSC's

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<sup>26</sup> DTSC Opposition Brief at p. 3, lines 23-28.

disappointing legal positions in this appeal would make it inequitable to absolve the agency of its obligations to provide CWM with responsible compliance assistance, a thoughtful review of technical data, and its cooperation to minimize wasted resources (both public and private).

### **3.1 DTSC Cannot Credibly Argue that CWM Engaged the Wrong Process for Challenging an Extension of the Post-Closure Care Period**

In its Opposition Brief, DTSC argues that “[i]f a hazardous waste facility owner wants DTSC to consider a shorter post-closure period, they should follow permit modification procedures . . . .”<sup>27</sup> Here, too, DTSC misstates the law. The regulations clearly provide that “. . . any time during the post-closure period for a particular unit; *the Department* shall, in accordance with the permit modification procedures. . . . extend the post-closure care period applicable to the hazardous waste management unit or facility if the Department finds that the extended period is necessary to protect human health or the environment. . . .”<sup>28</sup> Thus, it is DTSC, and not CWM, that bears the burden of engaging the permit modification procedures if DTSC wishes to change the post-closure period in a permit (or, at a minimum, make the necessary findings during a permit renewal).

More troubling than this misstatement of the law, however, is DTSC’s suggestion that CWM is somehow at fault for not having initiated a permit modification when DTSC first sought to extend the post-closure period. This suggestion is troubling because it implies that CWM was wrong to follow DTSC’s explicit directions.

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<sup>27</sup> DTSC Opposition Brief at p. 7, lines 24-27.

<sup>28</sup> 22 Cal. Code Reg. § 66264.117(b)(2).

DTSC program staff outlined a process for CWM to present a work plan for studies to justify ‘clean closure’<sup>29</sup> when it issued the 2007 permit.<sup>30</sup> CWM has worked cooperatively with the program staff to follow that course. CWM conducted each of the studies DTSC requested. These included studies of whether the Facility ever received hazardous waste, a geophysical survey of the Site to look for buried drums, soil sampling to ascertain whether the Site now contains hazardous waste, and a risk assessment.<sup>31</sup>

CWM worked in good faith with DTSC program staff for three years, culminating in meetings in December 2008 and January 2009, in which DTSC proposed transfer of the Site to the Water Board, pending receipt of a final risk assessment. For DTSC counsel now to suggest that this was the ‘wrong procedure’ and CWM should instead have asked for a permit modification is not only contrary to law, but also undercuts the substantial reliance CWM placed on its collaboration with the agency staff and the written directives it received.

If DTSC truly believes permit modification is the only procedural mechanism for shortening the 30-year post-closure period, it should have informed CWM of that view years ago. An obvious opportunity would have been in 2006, when DTSC responded to CWM’s comments on the draft permit. Another obvious opportunity would have been in 2007, when DTSC issued the permit that was appealed. It is formalistic and unfair to suggest, years later,

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<sup>29</sup> Appealed Post Closure Permit at p. 10, Special Condition 2 (“submit a work plan demonstrating that the Facility will meet the closure by removal and decontamination standards of chapter 14 of division 4.5 of the California Code Regulations, Title 22”).

<sup>30</sup> After presenting two alternatives in the draft 2006 permit, a senior program manager with DTSC met with CWM to discuss possible ‘clean closure’. CWM conducted a series of technical studies to ascertain whether ‘clean closure’ was supportable. In January 2009, DTSC met with CWM and the Water Board to discuss transferring the Facility to the Water Board for regulatory oversight. See CWM Opening Brief at pp. 9-10, 22.

<sup>31</sup> CWM Opening Brief at pp. 7-10.

after CWM has incurred substantial costs in carrying out the agency's dictates, that the company did not make the request in the proper format.

### **3.2 This Appeal Should Have Been Continued While DTSC and CWM Came to Final Terms on Key Technical Issues**

On multiple occasions before the first brief in this matter was due, CWM advised DTSC's counsel that CWM believed that its technical studies could resolve the agency's concerns about the adequacy of the landfill cover – the key technical issue in the Appealed Post-Closure Permit.

CWM asked DTSC to agree to a stay of the briefing schedule to allow the parties to complete their review of the data and select an appropriate course of action for the Site, thereby saving considerable costs on legal arguments. Stating only that it felt the need to move forward in the appeal, DTSC refused to agree to a stay of the briefing schedule, requiring both parties to expend significant resources briefing the issues.

Since that time, DTSC program staff have now concurred with CWM (in the April 26, 2009 memo) that the cover meets the applicable regulations and is functioning well. Therefore, in the Opposition Brief, DTSC conceded the key technical and cost issue in this matter, i.e., that a new \$30 million cover for the Facility is not needed. What now remains is for DTSC and CWM to finish evaluating the technical data and define the regulatory steps appropriate to complete CWM's RCRA post-closure obligations at the Bakersfield Site and transfer the Facility to the oversight of the Water Board.

On November 4, 2008, CWM submitted a written request to DTSC to take action on the option outlined in the Appealed Post-Closure Permit. This letter states:

Given the results of the Waste-In Report and Waste Characterization Report showing no hazardous waste at the Facility and no significant risk to human health or the environment, there is no public policy rationale for spending significant sums of money to comply with the extensive RCRA post-closure care regulations which were designed for disposal facilities at which long term hazards present a public health or environmental concern.

CWM respectfully requests that DTSC approve Permit Option 2 by making a determination to clean close the Facility, completing its RCRA obligations for formal post-closure care. The Regional Water Quality Control Board, Central Valley Region is the appropriate agency to provide oversight for ongoing monitoring of the Facility, including groundwater monitoring and maintenance of the cap.

We would like to meet with you and your technical staff within the next six weeks to discuss these reports and the path forward for the CWM Bakersfield facility.<sup>32</sup>

In fact, a meeting with DTSC and CWM did take place in December 2008 at which Wade Cornwell, senior DTSC staff, asked CWM to prepare a final risk assessment to supplement the prior studies in order to confirm that the Site is low risk. He stated that if the risk assessment showed low risk, the DTSC Permitting Branch would prepare a memorandum to then Deputy Director Watson Gin recommending that DTSC oversight of the Facility be terminated and transferred exclusively to the Water Board.<sup>33</sup> CWM has prepared that risk assessment and intends to submit it to DTSC in June 2009, or earlier.

CWM continues to believe that a reasonable course of action is for this matter to be continued while the DTSC program staff and CWM reach a final resolution of the matter.

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<sup>32</sup> Letter from Phil Perley (CWM) to Wade Cornwall (DTSC), November 4, 2008, attached as Exhibit 2.

<sup>33</sup> CWM Opening Brief at p. 9.

### **3.3 The Appealed Post Closure Permit Contains Mis-Statements About Key Technical Issues**

CWM appreciates the careful technical evaluation DTSC staff made of Site conditions in their memo of April 26, 2009, submitted to this tribunal along with the Opposition Brief. However, some of the sound technical judgments made by DTSC program staff have not been reflected in the regulatory findings associated with the Appealed Post-Closure Permit.

An example of this is the agency's apparent misunderstanding of the Northwest Collection Point. In the 2006 Draft Post-Closure Permit, DTSC wrongly identified the Northwest Canyon Collection Point as a leachate collection and recovery system for the WWMU.<sup>34</sup> DTSC argued that the volume of "leachate" removed from the Northwest Canyon Collection Point during the 1998 storm season indicated that the closure cover was not preventing rainfall infiltration through the cover and through waste. DTSC concluded that the cover needed to be replaced or extensively repaired.

CWM corrected DTSC's view of the Northwest Canyon Collection Point in its 2006 comments to the draft Post Closure Permit. In its Response to Comments (included with the 2007 Appealed Post-Closure Permit), DTSC acknowledged that the Northwest Canyon Collection Point does *not* collect leachate:

After review of additional information, it is DTSCs understanding that there is not a hydraulic connection between the WWMU and the northwest canyon collection point. The findings document has been amended to reflect this information.<sup>35</sup>

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<sup>34</sup> See 2006 draft Post-Closure Permit at p. 10.

<sup>35</sup> See DTSC Response to Comments, Comment 15 (emphasis added).

DTSC amended the draft Post-Closure Permit accordingly.<sup>36</sup> However, despite having acknowledged that it had misunderstood the relationship between the Northwest Canyon Collection Point and the WWMU, the Appealed Post-Closure Permit nevertheless required the landfill cover to be replaced or extensively repaired. Because cover replacement or repair reappeared as a condition of the permit, CWM spent considerable resources producing studies demonstrating that the landfill cover was in good condition and performing effectively.

In its recent April 21, 2009 memorandum, DTSC claims that it was its misunderstanding of the function of the Northwest Canyon Collection Point that prompted its faulty conclusion that the landfill cover was not functioning properly and that it needed extensive repair or reconstruction:

The North West Canyon Sump (NWCS) is not hydraulically linked to waste management units. DTSC Permitting now understands that a clear hydraulic link between the NWCS and adjacent Western Waste Management Units (WWMU) does not exist. **At the time of issuance of the Permit DTSC Permitting believed the NWCS served as a leachate collection sump for the WWMUs.** DTSC now understands that the NWCS was originally built to collect groundwater impacted by a spill that had occurred in the North West Canyon. As the overwhelming majority of the total leachate removed during 1998 came from the NWCS, the lack of a hydraulic link to waste management units does not support the assertion that the cover allowed water to infiltrate through to the leachate collection sump.<sup>37</sup>

This explanation, however, is not consistent with the administrative record in this matter, which reflects that DTSC acknowledged the lack of hydraulic connection in its Response to Comments in 2007. This suggests that CWM's considerable costs to prepare studies showing that the cover

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<sup>36</sup> See DTSC 2007 Appealed Post-Closure Permit at p. 9.

<sup>37</sup> See DTSC Memo, April 21, 2009, Closure Cover Appeal Decision, Chemical Waste Management Bakersfield Facility, Kern County, CA, EPA ID CAT000624056 (emphasis added).

was not in need of reconstruction were unnecessary. This flip-flop also further underscores the need to maintain the current process, which requires DTSC to make findings of necessity before extending the post-closure care period, so that permit holders can be apprised of the basis of the agency's decision and can correct them if, as was the case in this matter, DTSC is wrong on the underlying facts.

#### **4. DTSC's Opposition Brief Ignores Extensive Factual Data Supplied by CWM**

DTSC's Opposition Brief completely ignores the detailed studies that CWM has done over the past three years. It ignores:

- (i) CWM's Waste-In Study that concluded that *99.76 %, or more, of the documented waste accepted at the Facility was clearly non-hazardous*;<sup>38</sup>
- (ii) CWM's Waste Characterization Study showing that *wastes remaining on the Site are not hazardous*, using accepted DTSC and U.S. EPA methodology;<sup>39</sup>
- (iii) Data showing that *Site leachate and groundwater do not contain hazardous constituents*;<sup>40</sup> and
- (iv) DTSC's own findings, reported to federal EPA, that the Site has no hazardous constituents in groundwater and *does not pose a significant risk to human health or the environment*.<sup>41</sup>

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<sup>38</sup> CWM Opening Brief at pp. 23-24 and Tab 10 (Waste-In Study).

<sup>39</sup> As CWM explained in its Opening Brief, extensive soil sampling performed in 2008 showed that Site wastes are not hazardous. Using waste sampling statistical protocols required by DTSC regulations, outlying data points were excluded through the use of an upper confidence limit ("UCL") calculation. Applying this UCL methodology, the soil sampling demonstrates that the waste at the Site is not hazardous. These results are not surprising as little or no hazardous waste was accepted at the Site. There is simply no technical justification for managing the Site as a RCRA hazardous waste landfill. CWM Opening Brief at pp. 19-24 and Tab 12 (Waste Characterization Report).

<sup>40</sup> CWM Opening Brief at pp. 41-43 and Tab 14, Second Semiannual and annual 2008 Monitoring Report Bakersfield Facility.

<sup>41</sup> CWM Opening Brief at pp. 20-22.

DTSC's Opposition Brief wholly ignores all the studies and data and concludes, without any analysis, that the Site contains hazardous waste. It claims that because "[m]aterial buried at the Facility are *legally* classified as hazardous waste *regardless* of groundwater monitoring data results . . . . at this time, neither groundwater monitoring data or the preliminary site characterization data can substantiate a decision other than the continuation of post closure."<sup>42</sup> However, the Opposition Brief fails to identify *why* this is so, other than an apparent desire to maintain the legal fiction that the Site is hazardous, notwithstanding the significant quantum of evidence demonstrating otherwise.

DTSC's Opposition Brief also contains the faulty premise that if authority is transferred to the Water Board (or if the post-closure care period is shortened or maintained as-is), CWM would abandon proper operation and maintenance of the existing landfill cover. This is not the case. CWM will continue to maintain adequate safeguards at the closed Facility to protect human health and the environment, whether regulated by the DTSC under Title 22 or the Water Board under Title 23 or Title 27.

**5. The Findings on Which DTSC Extended the 30-Year Period are Superseded by Information from CWM's Detailed Technical Studies**

In conclusion, CWM submits that the findings on which DTSC based the extension of the post-closure care period until 2037 in the Appealed Post-Closure Permit have now been rendered moot. They have been superseded by the extensive technical data generated by CWM over the

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<sup>42</sup> DTSC Opposition Brief at p. 8, lines 4-13.

past three years. We briefly recap these findings,<sup>43</sup> and compare them with the current knowledge about the Site:

- **Finding:** *“Disposed hazardous wastes have not likely degraded since the Facility's closure, and will not likely degrade in a 30-year time period from 2006.”*
- **CWM Response:** The Site does not have hazardous wastes, so this is not a concern. Studies show that 99.76% or more of the waste initially deposited at the Site were not hazardous. They also show that no hazardous wastes remain at the Site, using accepted DTSC and U.S. EPA methodology. In addition, there are no hazardous constituents in Site leachate and groundwater.
- **Finding:** *“The burden of costs associated with maintaining the Facility will default to the California taxpayers should post-closure care be allowed to expire.”*
- **CWM Response:** There is no basis for assuming the California taxpayers would become burdened with the cost of caring for this non-hazardous waste landfill. CWM would continue to own the Site and remain legally responsible for its ongoing monitoring and maintenance under stringent regulations of the Water Board.
- **Finding:** *“The containment system at the Facility has deteriorated since 1991 when it became subject to post-closure care. If allowed to go unmaintained as a result of cessation of the post-closure period, the deterioration which has occurred during the Facility's first 15-years of post-closure will continue and will likely be considerably more significant. The result of such deterioration would include onsite environmental exposures to the disposed hazardous wastes.”*
- **CWM Response:** DTSC's April 26, 2009 memorandum now rebuts these findings. DTSC's current view is that the existing closure cover meets applicable regulatory requirements under Title 22.
- **Finding:** *“Long-term neglect of post-closure care will likely result in this deterioration additionally leading to hazardous wastes washing from the Facility into Poso Creek which could impact several downstream environmental receptors. Poso Creek's final discharge point is furthermore the Kern National Wildlife Refuge.”*
- **CWM Response:** The Site does not contain hazardous wastes that will wash anywhere. The above finding is not supported by any technical data. The Site does not contain hazardous waste; leachate derived from Site wastes is not hazardous; groundwater affected by the waste does not contain hazardous constituents; and the closure cover is functioning effectively.

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<sup>43</sup> *Chemical Waste Management Bakersfield Facility Post Closure Care Findings and Determinations*, DTSC (June 2006) at pp. 24-25 of 61.

In sum, CWM and DTSC now agree that the closure cover at the Bakersfield Facility is in good condition, meets applicable requirements, and does not need to be replaced at a cost of \$30 million. The remaining issue is how to complete the evaluation of the Facility's post-closure care obligations under RCRA. CWM has shown, through detailed studies, that there is no justification for extending the post-closure period at Bakersfield until 2037. In fact, to the contrary, the facts show that there is a sound basis for transferring this Facility to the oversight of the Water Board, as proposed by senior DTSC program staff in December 2008 and January 2009.

### **RELIEF REQUESTED**

CWM concurs with DTSC's recommendation that this tribunal grant CWM's Appeal Comments 3.4 and 3.7 and deny DTSC permit conditions V.1, V.2, V.3b and V.3.c.

In addition, CWM requests relief in the following form:

#### **1. Termination of the Post-Closure Care Permit**

Based on the weight of the evidence presented by CWM, and largely accepted by DTSC, demonstrating that Bakersfield is a low risk site and that it meets the 'clean closure' standards, CWM requests that this tribunal terminate Bakersfield's post-closure care permit, allowing authority for the Site to be transferred to the Water Board.

#### **2. Remand the Matter to DTSC for Action on CWM's 'Clean Closure' Request**

*In the alternative*, CWM requests that this tribunal remand this matter to DTSC for agency action on CWM's November 2008 request for 'clean closure'. Should that request be declined, the Hearing Officer can then render a decision on the terms of the Appealed Post-Closure Permit.

**3. Issue a Revised Post-Closure Care Permit**

Finally, *as a third (least preferred) alternative*, CWM requests that its Appeal Comments be granted, and that the Appealed Post-Closure Permit be issued in the form of the redline of the 2007 Appealed Post-Closure Permit attached to this brief as Exhibit 3, which incorporates the detailed comments CWM filed with its initial appeal.

Respectfully submitted,

//original signed by//

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